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90-1199

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

MARK E. LUMPKIN
Petitioner

v.

BEVERLY TRAVIS LUMPKIN
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

H. GAYLE MARSHALL
910 FORD STREET
LAKE CHARLES, LA 70601
(318) 433-1414
Counsel for Petitioner
Counsel of Record

QUESTION PRESENTED FOR REVIEW

Mark E. Lumpkin and Beverly Travis Lumpkin entered into a community property settlement wherein Mark E. Lumpkin obtained the primary asset of the community, namely the business known as Lumpkin Financial Planning, and Beverly Travis Lumpkin obtained $700.00 per month as "permanent alimony". Is the $700.00 per month "permanent alimony" dischargeable under the provisions of Section 523 of the Bankruptcy Code?

PARTIES INVOLVED

Pursuant to Supreme Court Rule 21, the parties involved in the proceedings before the United States Court of Appeals for the Fifth Circuit was and are the following:

Mark E. Lumpkin
Petitioner
4704 W. Quail Hollow
Lake Charles, LA 70605

Beverly Travis Lumpkin
Respondent
1714 Cappy Drive
Lake Charles, LA 70605

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NO.

MARK E. LUMPKIN

V.

BEVERLY TRAVIS LUMPKIN

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is unpublished as noted at 918 F.2d 175 (5th Cir.1990), but the opinion is provided in the Appendix of this Petition. The opinions of the United States District

Court for the Western District of Louisiana and of the United States Bankruptcy Court for the Western District of Louisiana are unreported and are also provided in the Appendix.

STATEMENT OF JURISDICTION

A writ of Certiorari is sought to review the decision of the United States Court of Appeals for the Fifth Circuit dated and entered October 26, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. Sections 1254(1) and 2102(c)

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED

Section 727(b) of Title 11 of the United States Code provides as follows:

"(b) except as provided in Section 523 of this Title, a discharge under sub-section (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this Chapter,..."

Section 523 of Title 11 of the United States Code (Exceptions to Discharge) provides in part as follows:

"(a) A discharge under Section 727...of this Title does not discharge an individual debtor from any debt - - "

...(5) to a spouse, former spouse or a child of the debtor for alimony to, maintenance for, to support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with state or territorial law by a governmental unit, or property settlement agreement, but not to the extent that - - -

...(b) such debt includes a liability designated as alimony, maintenance, support, unless such liability is actually in the nature of alimony, maintenance or support; . . ."

STATEMENT OF THE CASE

On January 20, 1986, Mark E. Lumpkin and Beverly Travis Lumpkin obtained a Judgment of Separation. On that same date, the parties entered into a Community Property Settlement which had been negotiated over a number of months.

The Community Property Settlement (a) divided certain minor assets between the parties, (b) provided that certain assets would be given to Mr. Lumpkin with a requirement that he pay to Mrs. Lumpkin one-half of the net sales proceeds upon the sale of those assets, (c) transferred the major asset of the parties, the business know as Lumpkin Financial Planning to Mark E. Lumpkin, and (d) provided that as additional consideration, Mark E. Lumpkin ratified and confirmed his agreement to pay contractual alimony of $700.00 per month as provided for in the Judgment of Separation, which alimony would not be subject to modification.

On September 13, 1989, Mark E. Lumpkin filed for personal bankruptcy under the provisions of Chapter 7 of the Bankruptcy Act.

On October 24, 1989, Mark E. Lumpkin filed an adversary complaint as against Beverly Travis Lumpkin, requested that the Court determine the dischargeability of the indebtedness owed by Mark E. Lumpkin to Beverly Travis Lumpkin and as represented by the $700.00 per month "permanent alimony" claim, the complaint making the following allegation:

"Beverly Travis Lumpkin and Mark E. Lumpkin entered into a Community Property Settlement at the time of the separation and/or divorce as between the parties. A part of the Community Property Settlement was to compensate Beverly Travis Lumpkin for the value of the business owned by the parties. As a result, Mark E. Lumpkin agreed to pay Beverly Travis Lumpkin the sum of $700.00 per month as "permanent alimony" when in fact the sum represented compensation for community property settlement."

On January 12, 1990, a trial was held in the bankruptcy court on the adversary complaint. Judgment was rendered in open

court and a formal judgment was signed on February 26, 1990, which judgment declared the debt non-dischargeable.

An appeal was taken to the district court and on May 24, 1990, a memorandum ruling was rendered by Judge Edwin F. Hunter affirming the decision of the bankruptcy judge.

An appeal was taken to the Court of Appeals for the Fifth Circuit and on October 26, 1990, a decision was rendered by said Court affirming the decision of the District Court judge and the bankruptcy judge.

REASONS FOR GRANTING THE WRIT

Petitioner seeks the granting of the Writ of Certiorari inasmuch as the decisions

in the lower courts have far departed from the accepted and usual course of judicial proceedings and have extended circuit court case law to an unacceptable limit. The issue is one that has not been before the United States Supreme Court before and is in need of settlement: the interpretation of Section 523(a)(5)(b) of the Bankruptcy Code (Title 11 of the United States Code).

Section 727(b) of Title 11 of the United States Code provides as follows:

"(b) except as provided in Section 523 of this Title, a discharge under sub-section (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this Chapter,..."

Section 523 of Title 11 of the United States Code (Exceptions to Discharge) provides in part as follows:

"(a) A discharge under Section 727...of this Title does not discharge an individual debtor from any debt - - "

> ...(5) to a spouse, former spouse or a child of the debtor for alimony to, maintenance for, to support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with state or territorial law by a governmental unit, or property settlement agreement, but not to the extent that - - -
>
> > ...(b) such debt includes a liability designated as alimony, maintenance, support, unless such liability is actually in the nature of alimony, maintenance or support; . . ."

The essence of these provisions is that a discharge under Section 727 does not discharge an individual from any debt to a former spouse for alimony, maintenance or support, provided that such liability is actually in the nature of alimony, maintenance or support. The purpose of this

exception to non-dischargeability is to assure that a debt will not be rendered non-dischargeable merely because it is designated as alimony, maintenance or support. An agreement between husband and wife may expressly describe an obligation created therein as "alimony", but the label is insufficient to make the obligations non-dischargeable unless the payment is actually for the support and maintenance of a spouse, former spouse or child of the debtor. See Collier on Bankruptcy, Section 523.15 [5](14th ed. 1989).

The Bankruptcy Court, for purposes of determining dischargeability must determine the true nature of the debt, regardless of the characterization as placed upon it by the parties' agreement or state court proceedings. See Matter of Benich, 811 F.2d

902, 904 (11th Cir. 1985). The court must make a determination as to whether an obligation is in the nature of support or whether it is in reality consideration in or for a property settlement. In Re Harrell, 754 F.2d 902, 905 (11th Cir. 1985).

In the context of a voluntarily executed marital settlement agreement, the proper test is whether it was the parties intention at the time of execution of the documents that the payments be for support or as a property settlement. In the Matter of Long, 794 F.2d 928 (4th Cir. 1986).

The intent of the parties on January 20, 1986 can only be ascertained from the evidence presented.

In the instant case, the Community Property Settlement was executed the same date as the date on which the Judgment of

Separation was obtained, January 20, 1986.

Wade Kelly, who had represented Mark E. Lumpkin during the negotiations leading to the execution of the Community Property Settlement, testified at trial that the $700.00 per month payment designated "permanent alimony" described in the Community Property Settlement and in the Judgment of Separation was in fact compensation for Beverly Travis Lumpkin's one-half interest in the financial planning business of Mark E. Lumpkin. The monthly figure amounted to an amount calculated to be equivalent to one-half of the value of that business. The testimony of Mark E. Lumpkin also indicates that as the intent of the parties on January 20, 1986. Mr. Lumpkin testified that he got the financial planning business in the settlement and his wife got

$700.00 per month in consideration therefor.

Mrs. Lumpkin now denies that the consideration for her transfer of the financial planning business to Mr. Lumpkin was the payment of the $700.00 per month. This appears to be hindsight on her part for she now indicates that the reason it was not the consideration was that the financial planning business had no value. This after-the-fact reasoning, however, fails when one considers that the financial planning business grossed $300,000 plus in 1985 (the year before the separation but the last year for which the parties had figures as of the date of the Community Property Settlement, namely January 20, 1986) and grossed $280,000 plus in 1986. And, the parties filed joint tax returns for both of those years. So Mrs. Lumpkin knew full well

of the value of the business.

Additionally, Mrs. Lumpkin reasons away the provisions of the Community Property Settlement by indicating that the phrase "as additional consideration" meant nothing and that she received the $700.00 not in consideration of anything. It is submitted that the position of Beverly Travis Lumpkin that she got nothing for her half of the business and that the $700 per month was not in consideration of anything flies in the fact of the very document which she executed (the community property settlement) which was prepared by Wade Kelly after months of negotiations with Beverly Travis Lumpkin's counsel, namely Fred Godwin, who it should be noted did not testify.

On additional item shows the intent of the parties, that being the letter which

Mrs. Lumpkin identified and which she indicated she had forwarded to Mr. Lumpkin around the time of the filing of the bankruptcy. In the letter, Mrs. Lumpkin indicates that Mr. Lumpkin got the business and she got $700 per month.

Two additional items bear on the actual intent of the parties. First, Mr. Kelly testified that the only reason the $700 per month was designated alimony was that Mr. Lumpkin's tax counsel, John McDonald, wanted the consideration for the business structured as alimony for tax purposes. Second, Mr. Lumpkin indicated that he did not have enough cash with which to outright purchase the interest of Mrs. Lumpkin in the business and that monthly payment was the only way available for him to acquire that interest.

The Bankruptcy Judge gave weight to certain negotiation letters between counsel prior to the execution of the Community Property Settlement. Mr. Kelly testified those were a few of many letters traded in the negotiations. They also were many months prior to the final settlement. Their relevance is questionable at best.

CONCLUSION

It is submitted that the lower courts erred in finding that the $700 per month "permanent alimony" obligation of Mr. Lumpkin to Mrs. Lumpkin was in the nature of support rather than consideration for the Community Property Settlement. The $700 per month permanent alimony claim simply

constituted consideration for the transfer of the interest of Mrs. Lumpkin in the financial planning business and did not constitute support.

Because the results of the proper application of Section 523 of the Bankruptcy Code is of extreme importance in the administration of day-to-day bankruptcy practice, your petitioner respectfully requests that the Writ of Certiorari be granted.

Respectfully submitted,

H. GAYLE MARSHALL
910 Ford Street
Lake Charles, LA 70601
(318) 433-1414

Attorney for Petitioner

UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

MARK E. LUMPKIN	)	APPEAL NO.
VS	)	83-1024
BEVERLY TRAVIS LUMPKIN	)	

DECIDED: October 26, 1990)

Before, JOLLY, HIGGINBOTHAM, and JONES, Circuit Judges.

PER CURIAM.

I.

Incident to their separation and ultimate divorce, on January 20, 1986, Mark E. Lumpkin and Beverly Travis Lumpkin entered into a community property settlement that required Mr. Lumpkin to pay Mrs. Lumpkin contractual alimony in the sum of $700.00 per month. The settlement also required, among other things, that

Mrs.Lumpkin surrender to Mr. Lumpkin her interest in their jointly-owned business, Lumpkin Financial Planning. On September 13, 1989, Mr. Lumpkin filed for personal bankruptcy under the provisions of Chapter Seven of the Bankruptcy Act, 11 U.S.C. Sections 101-700.

On October 24, 1989, Mr. Lumpkin filed an adversary complaint against his former wife, requesting that the court determine the dischargeability of his indebtedness to Mr. Lumpkin represented by the $700.00 monthly alimony payment. The complaint alleged as follows:

> Beverly Travis Lumpkin and Mark E. Lumpkin entered into a Community Property Settlement at the time of the separation and/or divorce as between the parties. A part of the Community Property Settlement

> was to compensate Beverly Travis Lumpkin for the value of the business owned by the parties. As a result, Mark E. Lumpkin agreed to pay to Beverly Travis Lumpkin the sum of $700.00 per month as 'permanent alimony' when in fact the sum represented compensation for community property settlement.

The bankruptcy court before which this dispute was tried declared Mr. Lumpkin's alimony obligation non-dischargeable. The district court affirmed the decision of the bankruptcy court. We also affirm.

II.

This case comes to us on appeal from the district court, which also sat as an appellate court in affirming the bankruptcy judge's order. We note first that we have jurisdiction under 28 U.S.C. Section

158(d). See In re Louisiana World Exposition, Inc., 832 F.2d 1391, 1395 (5th Cir. 1987). Our standard of review of fact finding in a case appealed from the district court but originating in a bankruptcy proceeding is the same as the standard applicable in the district court. Matter of Bardwell, 610 F.2d 228, 229 (5th Cir. 1980). The test is "not whether a different conclusion from the evidence would

be appropriate, but whether there is sufficient evidence in the record to prevent clear error in the trial judge's findings." Id. at 230. The bankruptcy

judge found that the $700.00 per month owed by Mr. Lumpkin to his former wife, an obligation identified by the settlement agreement as "contractual alimony," was in fact alimony and therefore not dischargeable. This finding was not clear error.

Mr. Lumpkin acknowledges that under federal law alimony is not dischargeable in bankruptcy. 11 U.S.C. Section 523 and 727.[1]

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[1] Section 727 of Title 11 provides in relevant part as follows:

> (b) Except as provided in Section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter . . . .

Nevertheless, Mr. Lumpkin correctly points out that the fact that a liability is designated "alimony" is not alone dipositive of the true nature of the obligation. To be non-dischargeable the obligation must actually be for the purpose of supporting and maintaining a spouse, former spouse, or child of the debtor. According to Mr. Lumpkin, in the context of a voluntarily executed marital settlement

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The relevant portion of Section 523 (Exceptions to Discharge) provides:

> (a) A discharge under Section 727 . . . of this title does not discharge an individual debtor from

agreement, the intent of the parties is the proper test for determining the true nature of the obligation. At trial, Mr. Lumpkin, attempted to demonstrate that the $700.00 monthly obligation identified as "contractual alimony" was in reality consideration for Mr. Lumpkin's ceded interest in Lumpkin Financial Planning. Mr. Lumpkin insists that the obligation was labeled "contractual alimony" only for tax purposes, and that this label did not evidence the true intent of the parties.

The bankruptcy court heard testimony from both Mr. an Mrs. Lumpkin and from the attorney who represented Mr. Lumpkin in the settlement negotiations. However, despite Mr. Lumpkin's protestations to the

contrary, the court held that the disputed obligation was non-dischargeable alimony. Based on the record and the briefs before us, we cannot conclude that this judgment was clearly erroneous. Therefore, WE AFFIRM.

> any debt. . . (5) to a spouse, a former spouse, or a child of the debtor, in connection with a separation agreement, divorce decree or other order of a court of record, determination
>
> made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that . . .
>
> (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA LAKE CHARLES DIVISION

IN RE:
MARK E. LUMPKIN : CASE NO. 89-81155-C7

* * * * * * * * * * *

MARK E. LUMPKIN

VS. : CIVIL ACTION NO. 90-0685
BEVERLY TRAVIS LUMPKIN : (Bankruptcy Appeal) JUDGE HUNTER

* * * * * * * * * * *

MEMORANDUM RULING ON APPEAL FROM BANKRUPTCY COURT

On January 20, 1986, Mark E. Lumpkin and Beverly Travis Lumpkin obtained a judgment of separation. On that same date, the parties entered into a community property settlement which had been negotiated over a number of months.

On September 13, 1989, Mark E. Lumpkin filed for personal bankruptcy under the

provisions of Chapter 7 of the Bankruptcy Act.

On October 24, 1989, Mark E. Lumpkin filed an adversary complaint as against Beverly Travis Lumpkin, requesting that the court determine the dischargeability of the indebtedness owed by Mark E. Lumpkin to Beverly Travis Lumpkin and as represented by the $700.00 per month "permanent alimony" claim, the complaint making the following allegation:

> "Beverly Travis Lumpkin and Mark E. Lumpkin entered into a Community Property Settlement at the time of the separation and/or divorce as between the parties. A part of the Community Property Settlement was to compensation Beverly Travis Lumpkin for the value of the business owned by the parties. As a result, Mark E. Lumpkin agreed to pay Beverly Travis

> Lumpkin the sum of $700.00 per month as "permanent alimony" when in fact the sum represented compensation for community property settlement."

On January 20, 1990, a trial was held on the adversary complaint. Judgment was rendered in open court and a formal judgment was signed on February 7, 1990, declaring the debt non-dischargeable.

Persuaded that the Bankruptcy Court's judgment is ample supported by the record, WE AFFIRM. To the extent that our review can be said to have involved a mixed question of law and fact, we have taken a "de novo" review. We are not persuaded by appellant's argument that the sole reason that the $700.00 per month was designated as "permanent alimony" was for tax

purposes. Equally unpersuasive is the alternative content that the $700.00 simply constituted consideration for the community property settlement.

We find no error, let alone a decisive one. The Bankruptcy Court's judgment of February 7, 1990 is affirmed in all respects.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, this 24th day of May, 1990.

/s/ Edwin F. Hunter, Jr.
EDWIN F. HUNTER, JR.
UNITED STATES DISTRICT
JUDGE, SENIOR STATUS

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

IN RE:
MARK E. LUMPKIN **CASE NO. 89-881155-LC-C7**

* * * * * * * * * * *

MARK E. LUMPKIN
VS. **ADVERSARY CASE NO.**
BEVERLY TRAVIS **89-AP-8086**
(LUMPKIN)

* * * * * * * * * * *

JUDGMENT ON COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT

The Complaint filed by the Debtor, Mark E. Lumpkin, to determine the dischargeability of certain indebtedness owed on a monthly basis to Beverly Travis (Lumpkin) came on for hearing on January 12, 1990. Present were Mark E. Lumpkin and his counsel, H. Gayle Marshall, and Beverly Travis, in proper person.

The Court considering the law and evidence offered:

IT IS ORDERED, ADJUDGED AND DECREED that the indebtedness owed to Beverly Travis (Lumpkin) by Mark E. Lumpkin described as "permanent alimony" and as described in the Community Property Settlement dated June 20, 1986, by and between the parties, be and it is hereby declared non-dischargeable.

JUDGMENT RENDERED in open Court on the 12th day of January, 1990.

JUDGMENT SIGNED in Chambers on the 26th day of February, 1990.

/s/ HENLEY A. HUNTER
HENLEY A. HUNTER
Bankruptcy Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the above and foregoing PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTY CIRCUIT was served on Beverly Travis Lumpkin, 1714 Cappy Drive, Lake Charles, LA 70605 on the 23rd day of January, 1991.

H. Gayle Marshall

H. GAYLE MARSHALL

SWORN TO AND SUBSCRIBED before me, Notary Public, on this the 23rd day of January, 1991 at Lake Charles, Louisiana.

Kay Vaughan Cupper

NOTARY PUBLIC
My Commission Expires
With Death